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Supreme Court of the United States

OCTOBER TERM, 1924

No. 583.

WALTER M. PIERCE, as Governor of the State of Oregon; ISAAC H. VAN WINKLE, as Attorney-General of the State of Oregon; and STANLEY MYERS, as District Attorney for Multnomah County, State of Oregon,
Appellants,
vs.
THE SOCIETY OF THE SISTERS OF THE HOLY NAMES OF JESUS AND MARY,
Appellee.

No. 584.

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Appellants,
vs.
HILL MILITARY ACADEMY,
Appellee.

Appeals from the District Court of the United States for the District of Oregon

Supplement to Briefs of Appellants, Isaac H. Van Winkle

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In *Meyer v. Nebraska*, 262 U. S. 390, 67 L. Ed. 1042, this court said:

"The American people have always regarded education and acquisition of knowledge as matters of supreme importance, which should be diligently promoted. * * *

"Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable—essential, indeed, to the public welfare. * * * The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy. * * *

"The established doctrine is that this liberty (that guaranteed by the 14th Amendment) may not be interfered with, under the guise of protecting the business interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts. *Lawton v. Steele,* 152 U. S. 133, 137, 38 L. Ed. 385, 388, 14 Sup. Ct. Rep. 499."

In *Truax v. Raich,* 239 U. S. 60, L. Ed. 131, 136, this court said:

"If the state is at liberty to treat the employment of aliens as in itself a peril, requiring restraint regardless of kind or class of work, it can not be denied that the authority exists to make its measures to that end effective. *Otis v. Parker,* 187 U. S. 606, 47 L. Ed. 323, 23 Sup. Ct. Rep. 168; *New York ex rel. Silz v. Hesterberg,* 211 U. S. 31, 53 L. Ed. 75, 29 Sup. Ct. Rep. 10; *Purity Extract & Tonic Co. v. Lynch,* 226 U. S. 192, 57 L. Ed. 184, 33 Sup. Ct. Rep. 44."

Since it appears that application of the principles announced in the above excerpts will determine the matters involved in the instant case, this appellant respectively solicits consideration by the court of a further principle; which, in the hurry of preparation of his principal briefs, did not, perhaps, receive the consideration which its importance should command.

There can be no doubt that if the state has the power to require the education of all children within its bounds, it has the right to adopt such regulations as will make this education effective. It has the right to assure that the education shall be thorough and that it shall adequately cover the branches deemed by the legislature to constitute a minimum of education.

All presumptions favor the constitutionality of the statute. If there is any state of facts which could exist which would justify the statute, the presumption will be indulged that this state of facts does exist. The presumption in this case would, therefore, be that it is impracticable to supervise the instruction given in the private and parochial schools so as to assure that children attending these schools will secure a thorough education up to the minimum prescribed by the legislature. In the case of the Society of the Sisters of the Holy Names of Jesus and Mary it is alleged that this particular school is giving this minimum of instruction in a proper way, but it is nowhere alleged that all of the private schools operating within the state of Oregon are so doing.

It being conceded that the state has power to compel attendance at some school, it follows, under familiar principles, that the legislature has a broad discretion in the selection of a means by which the results desired may be brought about.

"It is a settled principle of constitutional law that the government which has a right to do an act, and has imposed upon it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means."

6 R. C. L. 137;
Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394, 405.

"Congress must possess the choice of means, and must be empowered to use any means which are, in fact, conducive to the exercise of a power granted by the constitution."

U. S. v. Fisher, 2 Cranch. 358, 396, 2 L. Ed. 304, 317.

"The government which has the right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of accepting the object is excepted, take upon themselves the burden of establishing that exception.

* * * * *

"* * * Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

McCulloch v. Maryland, 4 Wheat. 316, 421, 4 L. Ed. 579, 605.

"* * * But in determining whether the legislature, in a particular enactment, has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid, unless it can be clearly shown to be in conflict with the constitution. It is a well-settled rule of constitutional exposition, that if a statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed."

Sweet v. Rechel, 159 U. S. 380, 393, 40 L. Ed. 188, 194.

Home Telephone Co. v. Los Angeles, 211 U. S. 265, 281, 53 L. Ed. 176, 186, 6 R. C. L. 102.

"When the constitution is silent, and the question is one of public policy, or relates to the best means or agency for the attainment of some governmental end, it must be presumed that the framers of the constitution intended to invest the legislative body with a large discretion in the selection of the agencies most suitable and beneficial to the public."

Overshiner v. State, 156 Ind. 187, 59 N. E. 468, 51 L. R. A. 748, 749, 750.

"It is also a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of people as a whole, and the courts will not lightly hold that an act passed by the legislature was one in the enacting of which it has transcended its power. * * *"

Atchison, Topeka & Santa Fe R. Co. v. Matthews, 174 U. S. 96, 19 S. C. R. 609, 43 L. Ed. 909, 913.

"* * * Subject to limitations the legislature of the state is authorized to pass measures for the protection of the people of the state in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted."

New York ex rel. Silz v. Hesterberg, 211 U. S. 31, 53 L. Ed. 75, 79.

"The question in each case is whether the legislature has adopted the statute in the exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the operation or spoilation of a particular class."

Holden v. Hardy, 169 U. S. 366, 42 L. Ed. 780, 793.

In reliance upon the foregoing authorities, we contend that it is within the legislative power of the state to adopt such means as will assure that every child within the state when he reaches maturity will have the minimum education essential to the proper discharge by him of the duties of citizenship. It is competent for the legislative power to determine whether or not this result can be obtained under a system which prescribes regulations for the operation of private schools. There is certainly room for some difference of opinion on this latter subject. It can not be said that the legislative branch of the government is acting arbitrarily and without any possible excuse if it reaches the conclusion that the proper supervision of private schools is impracticable under the conditions which obtain in Oregon. Human nature being what it is, and political conditions being what they are, there is room for the exercise of the

opinion that in certain counties, the county school superintendent will be superficial and ineffective in supervising the course of instruction in schools which are under control of others than the public authorities. The presumption is that the people of Oregon in enacting the statute, which is in question at this hearing, so believed.

This court will certainly not presume that in enacting the law under consideration the legislature of the state of Oregon and the people of that state, under the initiative, acted in an arbitrary and unreasonable manner and that the object of the said act was the spoilation of a particular class.

If the control of the education of children is within the police power of the state it is certainly competent for the state to select the means which seem to it most appropriate. It is to be assumed, and there is no evidence to the contrary, that before enacting this law the people took into consideration the relative degree of efficiency of private and parochial schools and the public schools, and determined that it was advisable and necessary for the promotion of the public welfare that all children within the class affected by the act be afforded the superior advantages of the common school system maintained by the state, and that the law was enacted as the result of careful and honest consideration of its effect upon the public welfare. This involves a matter of legislative judgment and discretion, and necessarily a comparison of methods used by such institutions. The courts can not make this comparison, weigh the feasibility and practicability of each and substitute their judgment and discretion for that of the legislature whose determination of the question they are called upon to review.

Knobloch v. Chicago, M. & St. P. R. Co., 31 Minn. 402, 18 N. W. 106;

Nelson v. Minneapolis, 112 Minn. 16, 127 N. W. 445, 29 L. R. A. (N. S.) 260;

St. Louis v. Liessing, 190 Mo. 464, 1 L. R. A. (U. S.) 918, 4 Ann. Cas. 112, 116.

The efficiency of the training afforded by private and parochial schools in the state of Oregon is a matter peculiarly within the knowledge of the people of that state, and concerning which the court does not have judicial knowledge.

Since the training of children in the common schools is a matter of supreme importance to the people of Oregon, they should be permitted to exercise their discretion as to the best means of promoting the general welfare in that regard.

Respectfully submitted,

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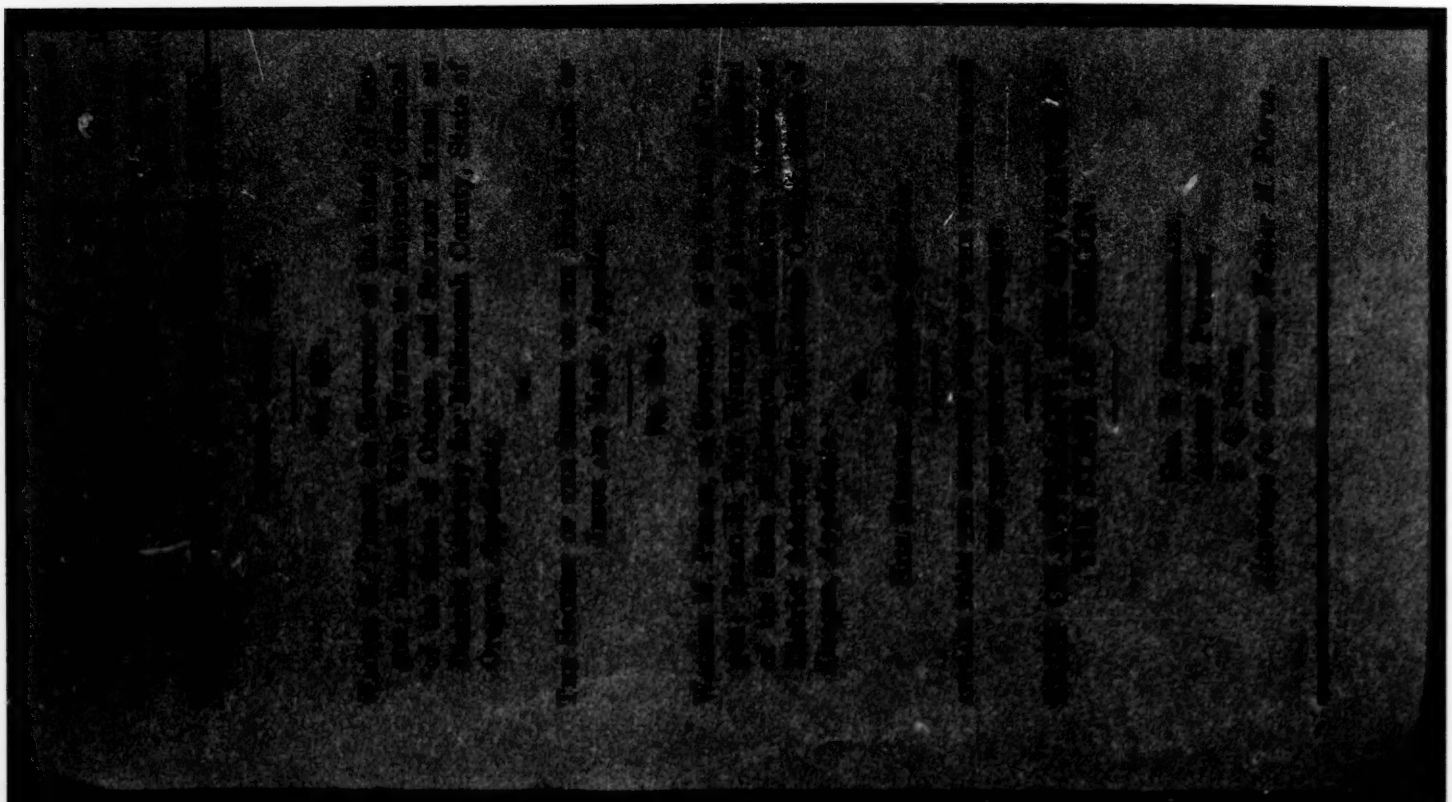

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HILL MILITARY ACADEMY, *Appellee.*

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

BRIEF OF APPELLANT, THE GOVERNOR OF THE STATE OF OREGON.

STATEMENT.

These cases arise out of an Act, proposed by Initiative Petition, and adopted at an election held in the State of Oregon, on November 7, 1922, by a majority

of the votes cast by legal voters upon the question of its adoption.

The purpose of this Act was to amend and extend the application of the compulsory feature of Section 5259, of the Oregon Laws, relative to compulsory education.

The text of this Act, in words and figures, was as follows:

> "A Bill for an Act to Propose by Initiative Petition to Amend Section 5259, Oregon Laws, Compulsory Education.
>
> "Be it enacted by the People of the State of Oregon:
>
> "Section 1. That Section 5259, Oregon Laws be, and the same is hereby, amended so as to read as follows:
>
> "Section 5259. Children Between the Ages of Eight and Sixteen Years. Any parent, guardian, or other person in the State of Oregon, having control or charge or custody of a child under the age of sixteen years and of the age of eight years or over at the commencement of a term of public school of the district in which said child resides, who shall fail or neglect or refuse to send such child to a public school for the period of time a public school shall be held during the current year in said district, shall be guilty of a misdemeanor and each day's failure to send such child to a public school shall constitute a separate offense. Provided, that in the following cases, children shall not be required to attend public schools.
>
> "(a) Children Physically Unable. Any child who is abnormal, subnormal, or physically unable to attend school.
>
> "(b) Children who have completed the Eighth Grade. Any child who has completed the eighth grade, in accordance with the provisions of the state course of study.

"(c) Distance from school. Children between the ages of eight and ten years inclusive, whose place of residence is more than one and one-half miles, and children over ten years of age whose place of residence is more than three miles, by the nearest traveled road from a public school; provided, however, that if transportation to and from school is furnished by the school district, this exemption shall not apply.

"(d) Private Instruction. Any child who is being taught for a like period of time by the parent or private teacher such subjects as are usually taught in the first eight years in the public school, but before such child can be taught by a parent or private teacher, such parent or private teacher must receive written permission from the county superintendent, and such permission shall not extend longer than the end of the current school year. Such child must report to the county school superintendent or some person designated by him at least once every three months and take an examination in the work covered. If, after such examination the county superintendent shall determine that such child is not being properly taught, then the county superintendent shall order the parent, guardian, or other person, to send such child to the public school the remainder of the school year.

"If any parent, guardian or other person having control or charge or custody of any child between the age of eight and sixteen years, shall fail to comply with any provision of this section, he shall be guilty of a misdemeanor, and shall, on conviction thereof, be subject to a fine of not less than $5.00, nor more than $100, or to imprisonment in the county jail not less than two nor more than thirty days or by both such fine and imprisonment in the discretion of the court.

"This Act shall take effect and be and remain in force from and after the first day of September, 1926."

Shortly after the adoption of this Act, and before the time at which it was to go into effect, the defendants in error brought bills of complaint, in the United States District Court for the District of Oregon against the plaintiffs in error, in their capacity as officials of the State of Oregon, seeking to restrain them from threatening or attempting to enforce the said Act.

In their bill the defendants in error charged that the Act violated the provision of the United States Constitution against the impairment of the obligation of contracts by the State, and also violated the various rights protected by the first section of the Fourteenth Amendment to the Constitution of the United States.

In the District Court the Judges held that the Oregon Act deprived the defendants in error of their property without due process of law, and granted a preliminary injunction restraining the plaintiffs in error "from threatening or attempting to enforce the act complained against."

From this decision the plaintiffs in error have taken an appeal to the Supreme Court of the United States.

The question in issue is whether the new Oregon School Law is in violation of any of the provisions of the Federal Constitution.

ASSIGNMENTS OF ERROR.

The appellants assign for error:

I

That the court erred in enjoining the enforcement of the statute enacted by the electors of Oregon under

the initiative on the 7th day of November, 1922, and set forth at large in the seventh paragraph of the amended bill of complaint, which statute is also set forth as chapter one of the General Laws of Oregon for the year 1923 in the compilation of the said General Laws of Oregon officially published by the State of Oregon.

II

The court erred in holding the statute set forth at large in the seventh paragraph of plaintiff's amended bill of complaint, which statute is also described as chapter 1 of the General Laws of Oregon for the year 1923 as violative of the constitutional rights of plaintiff.

III

The court erred in holding that the statute set forth at large in the seventh paragraph of the amended bill of complaint of plaintiff and published as chapter one of the General Laws of Oregon for the year 1923 is unconstitutional and void.

IV

The court erred in holding that plaintiff is in a position to raise the legal questions relied upon by it and determined in its favor by the above entitled court on the 31st of March, 1924.

V

The court erred in failing to sustain the motion of defendants to dismiss plaintiff's amended bill of complaint.

VI

The court erred in failing to hold that plaintiff's suit is prematurely brought and that the injunction prayed for by plaintiff should for this reason be denied.

VII

The court erred in passing an injunction order as against the defendant, Walter M. Pierce, as Governor of Oregon.

VIII

The court erred in passing an injunction order as against the defendant, Isaac H. Van Winkle, as Attorney General of Oregon.

IX

The court erred in passing an injunction order against the defendant, Stanley Myers, as District Attorney for Multnomah County, Oregon.

X

The court erred in restraining the expression and publication of the opinions of the defendants as to the constitutionality of the statute adopted under the initiative by the people of Oregon on the 7th of November, 1922, and published as chapter one of the General Laws of Oregon for 1923.

XI

The court erred in passing an injunctive order which fails to specify the acts on the part of defendants which are enjoined except only the expression and publication of the opinions of defendants set forth in the ninth assignment of error.

XII

The court erred in passing an injunctive order vague and uncertain as to the acts undertaken to be restrained and enjoined.

XIII

The court erred in holding that the statute so adopted under the initiative on the 7th day of November, 1922, and set forth at large in the seventh paragraph of the amended bill of complaint which statute is also published as chapter one of the General Laws of Oregon for the year 1923 in the official compilation of the said laws, is in conflict with the Constitution of the United States and particularly with the Fourteenth Amendment thereto.

ARGUMENT.

The assignments of error raise the question as to the constitutionality of the Act involved, and while in the argument we will discuss the points relied upon by the defendants in error, we do not undertake to follow the order in which the assignments of error are made.

The two cases involve almost exactly the same questions and the determination of one is decisive of the other and hence are covered by one brief.

The Power of the Federal Courts to Declare State Laws Unconstitutional.

Of all the powers possessed by the Federal Government, or any of its departments, the one which should be exercised with the greatest caution is the power of the Federal courts to declare state laws to be in violation of the Federal Constitution and therefore void.

Throughout all the time that has elapsed since the adoption of the Constitution, there have been, and are at the present time, two distinct governments within the territorial limits of each state of the United States.

Each of these governments has its own laws, and each has its tribunals for their enforcement. Neither government has the right to encroach upon the proper jurisdiction of the other. The United States Government is entirely the creation of the Constitution, it is a government of delegated powers, possessing no authority not granted to it, either expressly or by implication, by the Constitution.

While it is true, in accordance with the sixth article of the Constitution that, within their proper field, the Constitution, laws, and treaties of the United States are the supreme law of the land, it is equally true, not only in accordance with the express provision of the Tenth Amendment but also in accordance with the general spirit of the whole Constitution, that the Federal Government has no power to interfere with a subject of legislation which the United States Constitution left to the states.

In the case of *Collector* v. *Day* (11 Wall. 113; 20 L. Ed. 122), the Supreme Court of the United States said:

> "The general government, and the states, although both exist within the same territorial limits, are separable and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former, in its appropriate sphere, is supreme; but the states within the limits of their powers not granted, are in the language of the tenth amendment, 'reserved', are as independent of the general government as that government within its sphere is independent of the states."

Moreover when a Federal court is called upon to declare an act of a state legislature unconstitutional it is confronted not only with this presumption against

the right of the Federal Government to assume jurisdiction over any subject matter not granted to the United States Government or denied to the state governments by the United States Constitution, but also by an additional strong presumption in favor of the constitutionality of a statute.

> "When a law of Congress is assailed as void, we look in the National Constitution to see if the grant of specified powers is bread enough to embrace it; but when a state law is attacked on the same ground, it is presumably valid in any case, and this presumption is a conclusive one, unless in the Constitution of the United States or of the State we are able to discover that it is prohibited. We look in the Constitution of the United States for grants of legislative power, but in the Constitution of the State to ascertain if any limitations have been imposed upon the complete power with which the legislative department of the State was vested in its creation. Congress can pass no laws but such as the Constitution authorizes either expressly or by clear implication; while the State legislature has jurisdiction of all subjects on which its legislation is not prohibited." (Cooley's Constitutional Limitations, p. 173.)
>
> "Nor can a court declare a statute unconstitutional and void, solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the Constitution. . . . The rule of law upon this subject appears to be, that, except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operates

according to natural justice or not in any particular case. The Courts are not the guardians of the rights of the people of the State, unless those rights are secured by some constitutional provision which comes within the judicial cognizance. The remedy for unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil; but Courts cannot assure their rights. The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the law-making power. Any legislative act which does not encroach upon the powers apportioned to the other departments of the government, being prima facie valid, must be enforced, unless restrictions upon the legislative power can be pointed out in the Constitution, and the case shown to come within them." (*Id.*, p. 166.)

One of the most fundamental rules of constitutional and statutory construction is that a court should attempt to carry out the intention of those who framed and adopted a constitution or statute.

The debates in the Federal Constitutional Convention show that the framers of the Constitution would never have consented to any great degree of Federal control over state legislation. On August 23, 1787, Mr. C. Pinckney moved to add as an additional power to be vested in Congress:

> "To negative all laws passed by the several States interfering in the opinion of the legislature with the general interests and harmony of the

> Union; provided that two-thirds of the members of each House assent to the same."

This was defeated by a vote of six states to five. (New Hampshire, Pennsylvania, Delaware, Maryland, Virginia, aye—5; Massachusetts, Connecticut, New Jersey, North Carolina, South Carolina, Georgia, No—6). Among those who spoke against the adoption of this provision were the two members of the Convention who were later to become Chief Justices of the United States. Mr. Rutledge said on this question:

> "If nothing else, this alone would damn and ought to damn the Constitution. Will any state ever agree to be bound hand and foot in this manner? It is worse than making mere corporations of them whose bye-laws would not be subject to this shackle."

It was twenty-one years after the adoption of the United States Constitution before the United States Supreme Court for the first time declared an act of any state legislature unconstitutional. Even in this case Chief Justice Marshall, who rendered the decision, took occasion to strongly set out the great reluctance which the court should always feel against exercising this power:

> "The question, whether a law be void for its repugnancy to the Constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The Court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the

> legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." (*Fletcher* v. *Peck*, 6 Cranch 87, 3 L. Ed. 162.)

Mr. Taney, Mr. Marshall's successor as Chief Justice, said on this same question, in the case of *Ex parte Merryman* (Taney, 246), that the government of the United States is one of delegated and limited powers; that it derives its existence and authority altogether from the Constitution, and neither of its branches, executive, legislative, nor judicial can exercise any of the powers of government beyond those specified and granted; for the tenth amendment to the Constitution, in express terms, provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people."

Chief Justice Chase, the successor of Mr. Taney, in turn said:

> "Both the states and the United States existed before the Constitution. The people through that instrument established a more perfect union, by substituting a national government, acting with ample powers directly upon the citizens, instead of the confederate government, which acted with the powers, greatly restricted, only upon the states. But, in many of the articles of the Constitution the necessary existence of the states, and within their proper sphere, the independent authority of the states are distinctly recognized. To them nearly the whole charge of interior regu-

lation is committed or left; to them, and to the people, all powers, not expressly delegated to the national government, are reserved." (Lane County *v.* Oregon, 7 Wall. 71; 19 L. Ed. 104.)

Above all, the Supreme Court has frequently emphasized the fact that the question of the wisdom or expediency of a law must be decided by the legislative department of the government, and is entirely outside the field of judicial consideration.

In *Otis & Gassman* v. *Parker* (187 U. S. 606, 47 L. Ed. 323), the Court said:

"While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this court can know but imperfectly if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economic opinions, which by no means are held *semper ubique et ab omnibus.*

"Even if the provision before us should seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect. If the state thinks that an admitted evil cannot be prevented except by

prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it 'is a clear, unmistakable infringement of rights secured by the fundamental law'. Booth *v.* Illinois, 184 U. S. 425, 429; 46 L. Ed. 623, 626; 22 Sup. Ct. Rep. 425, 427. No court would declare a usury law unconstitutional, even if every member of it believed that Jeremy Bentham had said the last word on that subject, and had shown for all times that such laws did more harm than good. The Sunday laws, no doubt, would be sustained by a bench of judges even if every one of them thought it superstitious to make any day holy. Or, to take cases where opinion has moved in the opposite direction, wagers may be declared illegal without the aid of statute, or lotteries forbidden by express enactment, although at an earlier day they were thought pardonable at least. The case would not be decided differently if lotteries had been lawful when the 14th Amendment became law, as indeed they were in some civilized states. See Ballock *v.* State, 73 Md. 1; 8 L. R. A. 671, 20 Atl. 184. We cannot say there might not be conditions of public delirium in which at least a temporary prohibition of sales on margins would be a salutary thing. Still less can we say that there might not be conditions in which it reasonably might be thought a salutary thing, even if we disagreed with this opinion. . . . If at that time the provision of the Constitution, instead of being put there, had been embodied in a temporary act, probably no one would have questioned it, and it would be hard to take a distinction solely on the ground of its more permanent form. Inserting the provision in the Constitution showed, as we

have said, the conviction of the people at large that prohibition was a proper means of stopping the evil. And as was said with regard to a prohibition of option contracts in Booth *v.* Illinois, 184 U. S. 425, 431; 46 L. Ed. 623, 627; 22 Sup. Ct. Rep. 425, we are unwilling to declare the judgment to have been wholly without foundation."

In the above case the court thus strongly lays down the principle that if a state law might be justified under any set of circumstances, the Supreme Court should assume that the legislature enacted the law on account of the existence of such set of circumstances.

In *Booth* v. *Illinois,* (184 U. S. 425, 431; 46 L. Ed. 623, 627) the Supreme Court said:

"We are unwilling to declare these views of the state court to be wholly without foundation, and therefore cannot adjudge that the legislature of Illinois transcended the limits of constitutional authority when enacting the statute in question. In reaching this conclusion we have recognized the principle, long established and vital in our constitutional system, that the courts may not strike down an act of legislation as unconstitutional, unless it be plainly and palpably so.

"The statute here involved may be unwise. But an unwise enactment is not necessarily for that reason, invalid."

In *Jones* v. *City of Portland,* 245 U. S. 217-221, 62 L. Ed. 253-255, it was said:

"The attitude of this court towards state legislation purporting to be passed in the public interest, and so declared to be by the decision of the Court of last resort of the state passing the

act, has often been declared. While the ultimate authority to determine the validity of legisation under the 14th Amendment is vested in this court, local conditions are of such a varying character that what is or is not a public use in a particular state is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information."

In *Hebe Company* v. *Shaw*, 248 U. S. 297, 63 L. Ed. 255, the Supreme Court cites with approval the statement in *Price* v. *Illinois*, 238 U. S. 446, 452, 59 L. Ed. 1400-1405, 35 Sup. Ct. Rep. 892, that "the legislature is entitled to its own judgment," and, as a final test in the case before it says: "it is impossible for this court to say that they (i. e. the measures adopted) *might not be believed to be necessary* in order to accomplish the desired ends."

Still again in *Yazoo & Mississippi Valley Railroad Company* v. *Adams*, (180 U. S. 1, 45 L. Ed. 395) it was said:

> "Certainly this court is not the keeper of the states' conscience".

So vitally does a case of this character affect the sovereignty of the states, that in a similar suit in the past an individual justice of the Supreme Court indicated the opinion that such a suit was in reality one against the state itself and therefore prohibited by the 11th Amendment.

Grounds Upon Which it is Alleged that the Oregon School Law is Unconstitutional.

The opponents of the Oregon School Law charge that:

(1) It impairs the obligation of contracts;

(2) It abridges the privileges and immunities of the citizens of the United States;

(3) It deprives persons of property without due process of law;

(4) It deprives persons of liberty without due process of law; and

(5) It denies the equal protection of the laws.

In order to sustain their charge that the Oregon School Law is unconstitutional it is necessary for the defendants in error to clearly prove the truth of at least one of the above mentioned allegations. It is not a satisfactory substitute for this necessary clear proof as to one allegation to try to create some shadow of doubt as to two or three and to then attempt to pile those shadowy doubts up on top of each other.

It is therefore necessary to consider each of these constitutional prohibitions separately, each on its own merits.

The Oregon School Law does not Impair the Obligation of Contracts.

The assertion that the Oregon School Law impairs the obligation of contracts is clearly disposed of by the decision of the United States Supreme Court in the case of *Berea College* v. *Kentucky,* 211 U. S. 45; 53 L. Ed. 81. In this case it was contended that the obligation of the charter of Berea College was impaired by a Kentucky statute which had the effect of preventing colored students from attending the college, and thus reduced the number of students. The United States Supreme Court decided against the contention. In the present case it is claimed that the number of students at the complaining institutions will be decreased by the loss of all students under a cer-

tain age. It appears that the legal principles involved in the two cases are identical, and the decision in the earlier case should control the decision in the present case as to this particular contention by the defendants in error.

It is also an elementary principle of constitutional law that a state cannot contract away its police powers, or any of its fundamental governmental powers. *Beer Co.* v. *Massachusetts,* 97 U. S. 25; 24 L. Ed. 989; *Stone* v. *Mississippi,* 101 U. S. 814; 25 L. Ed. 1079; *Boyd* v. *Alabama,* 94 U. S. 650, 24 L. Ed. 302; *Illinois Central Railroad Co.* v. *Illinois,* 146 U. S. 387, 36 L. Ed. 1018.

The Fourteenth Amendment.

All of the remaining constitutional provisions which it is alleged that the Oregon School Law violates are contained in the Fourteenth Amendment. It is therefore appropriate that a few words should be said concerning the effect and general character of this amendment.

After the adoption of this amendment there were those who sought to give to it such a broad interpretation as would have completely revolutionized the relations between the Federal and State Governments. This extreme view, however, was effectually swept away by the decision of the United States Supreme Court in the *Slaughter House Cases* (16 Wall. 36; 21 L. Ed. 394).

It is now definitely settled that the Fourteenth Amendment did not radically alter the relations between the Federal and State Governments, or make the provisions of the Bill of Rights in the United

States Constitution binding upon the state governments.

> "The amendment creates no rights not existing before it. It originates none. It adds nothing to the catalogue of privileges, immunities, rights of life, liberty or property, or of equality before the law. It does not specify or define any of them. It only defends those rights existing under the law of the land, federal or state, and in being at its adoption, or born of the law afterwards. This is an important consideration in the construction and application of the amendment. It brings nothing new. It adds no privileges. The things it guarantees are old. It is only Magna Charta over again. It only enjoins upon the state, by the voice of the highest law, the duty of regarding and conceding certain cardinal rights, and grants to the national government the power to correct and reverse their plain denial by the action of the state. This is strongly illustrated by decisions holding that the right of suffrage and making a living by practising law are neither granted nor protected by this amendment. What could more strongly show that the amendment gave no new rights than the principle settled by many cases that 'due process of law' means the same as the words 'law of the land' in old Magna Charta?" (A treatise on the Rights and Privileges guaranteed by the Fourteenth Amendment to the Constitution of the United States, by Henry Brannon, sometime judge of the Supreme Court of West Virginia, pp. 47-48.)

The Oregon Statute does not Abridge the Privileges and Immunities of a Citizen of the United States.

The charge that the Oregon statute violates the privileges and immunities of citizens of the United

States is so manifestly without merit or legal basis as to be hardly worthy of serious consideration. Such a claim is completely disposed of by the following quotation from the decision of the United States Supreme Court in the *Slaughter House Cases* (16 Wall. 36; 21 L. Ed. 394) in which the meaning of the expression "the privileges and immunities of citizens of the United States" as the term is used in the Fourteenth Amendment to the United States Constitution, is thoroughly discussed:

> "It is quite clear, then, that there is a citizenship of the United States and a citizenship of a State, which are distinct from each other and which depend upon different characteristics or circumstances in the individual.
>
> "We think this distinction and its explicit recognition in this Amendment of great weight in this argument, because the next paragraph of this same section, which is the one mainly relied on by the plaintiffs in error, speaks only of privileges and immunities of citizens of the United States, and does not speak of those of citizens of the several states. The argument, however, in favor of the plaintiffs, rests wholly on the assumption that the citizenship is the same and the privileges and immunities guaranteed by the clause are the same.
>
> "The language is: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States'. It is little remarkable, if this clause was intended as a protection to the citizen of a state against the legislative power of his own state, that the words 'citizen of the state' should be left out when it is so carefully used, and used in contra-

distinction to 'citizens of the United States' in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

"Of the privileges and immunities of the citizen of the United States, and of the privileges and immunities of the citizen of the state, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the Amendment.

"If, then, there is a difference between the privileges and immunities belonging to a citizen of the United States as such, and those belonging to the citizen of the state as such, the latter must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the Amendment.

"The first occurrence of the words 'privileges and immunities' in our constitutional history is to be found in the fourth of the Articles of the Old Confederation.

"It declares 'that, the better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively.'

"In the Constitution of the United States, which superseded the Articles of Confederation, the corresponding provision is found in section two of the 4th article, in the following words: 'The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.'

"There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the Articles of the Confederation we have some of these specially mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

"Fortunately we are not without judicial construction of this clause of the Constitution. The first and the leading case on the subject is that of Corfield *v.* Coryell, decided by Mr. Justice Washington in the circuit court for the district of Pennsylvania in 1823. 4 Wash. C. C. 371.

"The enquiry, he says, is, what are the privileges and immunities of the citizens of the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are fundamental; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads; protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.

"The constitutional provision there alluded to did not create these rights, which it called privileges and immunities of citizens of the states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its citizens.

"Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more or less, shall be the measure of the rights of citizens of other states within your jurisdiction.

"It would be the vainest show of learning to attempt to prove by citation of authority, that up to the adoption of the recent amendments, no claim or pretense was set up that those rights depended on the Federal Government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed upon the states—such, for instance, as the prohibition against *ex post facto* bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the states, as above defined, lay within the constitutional and legislative power of the states, and without that of the Federal Government. Was it the purpose of the 14th Amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned from the states to the Federal

> Government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the states?
>
> "Having shown that the privileges and immunities relied on in the argument are those which belong to citizens of the states as such, and that they are left to the state government for security and protection, and not by this article placed under the special care of the Federal Government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no state can abridge, until some case involving those privileges may make it necessary to do so.
>
> "But lest it should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which owe their existence to the Federal Government, its national character, its Constitution, or its laws."

Just what is comprised under the term "privileges and immunities of citizens of the United States" was discussed in considerable detail in the decision in the case of *Twining* v. *New Jersey,* 211 U. S. 78, 53 L. Ed. 97:

> "Privileges and immunities of citizens of the United States, on the other hand, are only such as arise out of the nature and essential character of the national government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States." (Slaughter House Cases, supra, p. 79; Re Kemmler, 136 U. S. 436, 448; 34 L. Ed. 519, 524; 10 Sup. Ct.

Rep. 930; Duncan *v.* Missouri, 152 U. S. 377, 382; 38 L. Ed. 485, 487; 14 Sup. Ct. Rep. 570.

"Thus, among the rights and privileges of national citizenship recognized by this court are the right to pass freely from state to state." (Crandall *v.* Nevada, 6 Wall. 35; 18 L. Ed. 745); the right to petition Congress for a redress of grievances (United States *v.* Cruikshank, supra); the right to vote for national officers (Ex parte Yarbrough, 110 U. S. 651; 28 L. Ed. 274, 4 Sup. Ct. Rep. 152; Wiley *v.* Sinkler, 179 U. S. 58, 45 L. Ed. 84, 21 Sup. Ct. Rep. 17); the right to enter the public lands (United States *v.* Waddell, 112 U. S. 76, 28 L. Ed. 673, 5 Sup. Ct. Rep. 35); the right to be protected against violence while in the lawful custody of a United States marshal (Logan *v.* United States, 144 U. S. 263, 36 L. Ed. 429, 12 Sup. Ct. Rep. 617); and the right to inform the United States authorities of violation of its laws (Re Quarles, 158 U. S. 532, 39 L. Ed. 1080, 15 Sup. Ct. Rep. 959)."

This same case sums up this whole question in the following paragraph:

"There can be no doubt, so far as the decision in the Slaughter House cases has determined the question, that the civil rights sometimes described as fundamental and inalienable, which before the War Amendments, were enjoyed by state citizenship, and protected by state government, were left untouched by this clause of the 14th Amendment. Criticism of this case has never entirely ceased, nor has it ever received universal assent by members of this court. . . . But we need not now inquire into the merits of the original dispute.

> This part, at least, of the Slaughter House Cases, has been steadily adhered to by this Court."

To the same effect see also: *Hodges* v. *United States,* 203 U. S. 1, 51 L. Ed. 65, 27 Sup. Ct. Rep. 6; *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 52 L. Ed. 828; *Corfield* v. *Coryell,* 4 Wash. 371.

There is clearly no privilege or immunity involved in the present controversy which can fall within the definition of "privileges or immunities of citizens of the United States" contained in the decisions in the *Slaughter House Cases* and *Twining* v. *New Jersey.* If any privileges or immunities have been infringed they are those relative to the rights of parents over their children and the whole field of the law of Domestic Relations is beyond dispute under State jurisdiction and not under Federal jurisdiction.

In *Eadleigh* v. *Newhall,* 136 Fed. 941, it was held that parents have no right to the custody of their infant children, except subject to the paramount right of the State, to be exercised whenever deemed for the best interest of the children; that "the rights, privileges, and immunities which the Fourteenth Amendment guarantees are those of the United States and not of the States;" and that questions relative to the control of the minor children were questions of state law and not of Federal law.

In conclusion, as to the point it may be said that no right of a citizen can be held to be "a privilege or immunity of citizens of the United States" if such privilege or immunity existed before the adoption of the Constitution of the United States, and would exist independently of the provisions of the Constitution of the United States.

Due Process of Law.

The most overworked portion of the United States Constitution is the "due process of law" clause of the Fourteenth Amendment.

Although the Supreme Court in between eighty-five and ninety per cent of the cases involving this clause (even after we exclude those disposed of by memoranda decisions) which have come before it, has held that there was no denial of due process of law, the cry of such denial continues to be constantly raised by lawyers and litigants, as a last resort, upon the flimsiest of grounds.

Attention was called very early to this state of affairs by Mr. Justice Miller in the decision of the court in the case of *Davidson* v. *New Orleans,* 96 U. S. 97, 24 L. Ed. 616, in the following language:

> "It is not a little remarkable, that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal Government, for nearly a century, and while, during all that time, the manner in which the powers of that Government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been a part of the Constitution as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State Courts and State Legislatures have deprived their own citizens of life, liberty or property without due process of law. There is

> here abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State Court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded."

The most frequent and glaring mistake made by litigants relative to the due process of law clause, a mistake into which the defendants in error in this case seem to have fallen, lies in the apparent assumption that this clause in itself constitutes a guarantee of certain substantive rights, while in reality it plainly states that it is concerned solely with questions of procedure.

The statement can be made without qualification or exception that this clause does not confer any new substantive right of property or liberty upon any inhabitant of any State in the United States.

It confers no new rights, it only protects those which were already in existence, or which were later created. A person who contends that he has been deprived of some right without due process of law may be properly called upon to show from what source he derives the alleged right.

In some cases, where the right was a fundamental one, the existence of which was indisputable, and only the question of the violation was in dispute, the Supreme Court may have used language which might

be construed as indicating that the right itself was given by the Amendment; but in cases where the right itself was in dispute the Supreme Court has always recognized that the existence of the right cannot be based upon the Fourteenth Amendment, and has attempted to trace out whether the existence of the alleged right could be based upon some other constitutional provision, upon some statute, or upon the common law.

Thus in *Truax* v. *Raich*, 239 U. S. 33, 60 L. Ed. 131, where a law of Arizona requiring that every employer of more than five workers at one time, "regardless of the kind or class of work or sex of workers shall employ not less than eighty per cent qualified electors or native-born citizens of the United States or some subdivision thereof," was held to be in violation of the Fourteenth Amendment, the Supreme Court carefully showed how the right of the defendant in error which was held to be infringed grew out of the rights granted to him by the Federal Government when he was admitted as an immigrant into the United States.

The defendants in error in this case, therefore, must begin by laying the foundation for the very extraordinary rights claimed by them somewhere else than in the Fourteenth Amendment. The rights which they claim are certainly not granted them by the Federal Constitution, and no cases have been cited which hold that such rights existed at common law.

The Oregon Statute does not Deprive Anyone of Property without Due Process of Law.

The case set out by the plaintiff in the case of *Hill Military Academy* v. *Walter M. Pierce, Governor of the State of Oregon, et al.*, is mainly based upon the

charge that by the operation of the new Oregon Public School law the plaintiff would be deprived of his property without due process of law and the Judges in the District Court expressly based their decision entirely upon this point.

This point would seem to be very effectively disposed of, against the contentions of the plaintiffs and the decision in the District Court, by the many decisions of the United States Supreme Court upholding the constitutionality of various prohibition laws passed by different states. In many of these states it was charged that persons who had invested money in the liquor traffic while it was a lawful business were deprived of their property without due process of law by the passage of the Prohibition Amendment.

In discussing this contention in *Mugler* v. *Kansas* (123 U. S. 623; 31 L. Ed. 205, 8 Sup. Ct. Rep. 273) the Supreme Court said:

> "As already stated, the present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may be taken for public use without compensation. . . .
>
> "It is true that when the defendants in these cases purchased or erected their breweries, the laws of the State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give an assurance, or come under an obligation, that its legislation upon that subject would remain unchanged, Indeed, as was said in Stone *v.* Mississippi, 101 U. S. 814 (25 L. Ed. 1079) the supervision of the public health and the public morals is a governmental power 'continuing in its nature,' and 'to be dealt with as the special exigencies of the moment may require', and that

'for this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.' So in Boston Beer Co. *v.* Massachusetts, 97 U. S. 32 (24 L. Ed. 991); 'If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the Legislature cannot be stayed from providing for its discontinuance by an incidental inconvenience which individuals or corporations may suffer.' "

See also *Kidd* v. *Pearson,* 128 U. S. 1, 23; 32 L. Ed. 346; *Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311, 61 L. Ed. 326, 37 Sup. Ct. Rep. 180; *Crane* v. *Campbell,* 245 U. S. 304, 62 L. Ed. 304.

This principle of the non-liability of the government for loss to business incidentally resulting from state legislation is not confined to business of a similar character to that of the liquor traffic. Thus, in the case of *Madera Waterworks* v. *City of Madera,* 228 U. S. 454, 57 L. Ed. 915, the Supreme Court held that the property of a private waterworks company was not taken without due process of law, by the municipal construction of a competing plant, where there is no contract immunity from such competition, although the waterworks company may be forbidden by the local law to divert its property to other uses, and would be called upon to pay taxes to help its rival to succeed. This was the case of a business which everyone would concede to be innocent and beneficial, and which was, moreover, based upon a public franchise, but which was nevertheless held to be absolutely without any legal rights as against public competition.

In *Hadacheck* v. *Sebastian,* 239 U. S. 394, 60 L. Ed. 394, it was held that a municipal ordinance prohibiting brickmaking within a designated area, did not take,

without due process of law, the property of an owner of a tract of land within the prohibited district, although such land contained valuable deposits of clay suitable for brickmaking which could not profitably be removed and manufactured into brick elsewhere, and it was far more valuable for brickmaking than for any other purpose, and had been acquired by him before it was annexed to the municipality and had long been used by him as a brickyard.

Again, in *Tanner* v. *Little*, 240 U. S. 369; 60 L. Ed. 691, the Supreme Court upheld the imposition under Washington Laws 1913, Chap. 134, of a prohibitive license tax upon merchants using stamps, tickets, or coupons redeemable in cash, as inducements to purchase. The court thus held that there was no denial of due process of law to those engaged in the "trading stamp" business, although their business previously legal and certainly not *malum in se*, was destroyed as a result of state legislation.

In *Hebe Company* v. *Shaw*, 248 U. S. 297, 63 L. Ed. 255, the court upheld the constitutionality of an Ohio statute prohibiting the sale of condensed skim milk, although saying that such product might undoubtedly be healthful, citing *Purity Extract and Tonic Company* v. *Lynch*, 226 U. S. 192, 204, 57 L. Ed. 184, 183, 33 Sup. Ct. Rep. 44, to the effect that the power of the legislature "is not to be denied simply because some innocent articles or transactions may be found within the prescribed class."

Cases in which the Supreme Court has protected the right *to labor*, are not proper precedents in this case. There is a great distinction between the right to work, and the right to have a private business protected as against public competition or the exercise of the police powers of the state.

In the case of *Terrace* v. *Thompson,* 264 U. S. 197, involving the constitutionality of the Alien Land Law of the State of Washington, the Supreme Court expressly called attention to the fact that the decision in *Truax* v. *Raich,* (a case greatly relied upon by the Judges in the District Court in support of their decision) protected the right to labor, not the right to engage in any kind of a business. This decision was in part as follows: "It was said (i. e. in Truax *v.* Raich) that the right to work for a living in the common occupations of the community is a part of the freedom which it was the purpose of the 14th Amendment to secure. In the case before us, the thing forbidden is very different. It is not an opportunity to earn a living in common occupations of the community, but it is the privilege of owning or controlling agricultural land within the State. The quality and allegiance of those who own, occupy and use the farm lands within its borders are matters of highest importance and affect the safety and power of the State itself."

Is "the safety and power of the State" less effected by the control of education than it is by the control of farm lands?

The decision in the District Court contains the statement that: "the right to engage in a useful, legitimate business, not harmful or vicious, is protected under the amendment and cannot be abrogated," and cites in support of this proposition of law the case of *Murphy* v. *California,* 225 U. S. 623, 32 Sup. Ct. 697, 56 L. Ed. 1229. A careful reading, however, of this decision (which decided that a municipal ordinance prohibiting the keeping of billiard and pool tables for hire or public use did not constitute a denial of either due process of law or the equal protection of the laws) clearly shows that not even the dicta in the decision

supports so broad a statement as that contained in the decision of the lower court.

The Supreme Court has never held that there was a denial of due process of law where a private business was injured or even destroyed by state competition in a field in which a state might lawfully engage. If a state may engage at all in any field the question of the effect of state competition upon private business is immaterial.

The owners of private schools have even less basis for the claim that their property is taken without due process of law through the enactment of a compulsory education law than the owners of property used for saloon purposes had when their business was interfered with by a state prohibition law. In the latter case the entire use of the property for the purpose for which it was intended was prohibited; in the former case the school is only deprived of certain prospective students. A private school might still be continued for students under or over the age limits set by the law. A properly qualified teacher in a private school might easily secure a position as one of the additional teachers who would be required by the public schools.

No person in any business has such an interest in possible customers, as to enable him to restrain the government from exercising any proper power because it might deprive him of such patronage. To state such a contention is to show its absurdity.

The case of the Hill Military Academy is no stronger under the law, than would have been the case of a merchant who had attempted to restrain the operation of the draft act during the recent war on the ground that the government, by taking away certain of his customers, was depriving him of his property without due process of law.

With further reference to what is meant by the prohibition against taking property without due process of law, attention is called to the decision of the United States Supreme Court in the case of *Munn* v. *Illinois* (94 U. S. 113, 24 L. Ed. 77):

> "Looking then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only'. This was said by Lord Chief Justice Hale more than two hundred years ago in his treatise De Portibus Maris, 1 Warg, L. Tr. 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of that interest he has thus created."

The New Oregon School Law does not Deprive any Person of Liberty without Due Process of Law.

The question as to the deprivation of liberty without due process of law is very quickly disposed of, so far as these cases are concerned, by the fact that the defendants in error are corporations.

It is a well settled principle that the liberty protected by the Fourteenth Amendment is that of natural and not of artificial persons.

> "Equally without foundation is the contention that the statute, if enforced, will be inconsistent

with the liberty guaranteed by the Fourteenth Amendment. The liberty referred to in that Amendment is the liberty of natural, not artificial persons." *Northwestern National Life Insurance Company* v. *Riggs*, 203 U. S. 243, 255, 51 L. Ed. 168, 173.

"The liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of natural, not artificial persons." *Western Turf Association* v. *Greenberg*, 204 U. S. 359, 363, 51 L. Ed. 520, 522.

Nor can the defendants in error claim to have any such interests in the liberties of the school children of the State of Oregon or their parents. No person has the right to test the constitutionality of a law merely because it may affect the liberty of another person in whom he has no recognized legal interest.

In *Gusman* v. *Marrero*, 180 U. S. 81, 45 L. Ed. 436, the Supreme Court said:

> "It follows necessarily that he has no cause of action. However friendly he may be to the doomed man and sympathetic for his situation; however concerned he may be lest unconstitutional laws be enforced, and however laudible such sentiments are,—the grievance they suffer and feel is not special enough to furnish a cause of action in a case like this."

The question as to the interest which the defendants in error may have in the school children of Oregon and their parents as prospective patrons raises the question of deprivation of property without due process of law, and not that of 'deprivation of liberty without due process of law,' and has already been discussed.

The case of *Truax* v. *Raich*, 239 U. S. 33, 36 Sup. Ct. Rep. 7, 60 L. Ed. 131, relied upon by the judges in the

lower court, who decided that the Oregon School Law was unconstitutional is not applicable to the present case. In the earlier case, Raich, who sought to enjoin the enforcement of the Arizona anti-alien labor law, was a natural person whose own liberties were protected against deprivation without due process of law by the Fourteenth Amendment, and his own liberty to contract was directly affected by the law, although the penalty for its violation was exclusively directed against his employer.

Although it is believed that the charge that the new Oregon School Law deprives persons of liberty without due process of law is not properly before the Court in this case, it is also believed that such a charge could not be sustained even if raised by persons qualified to raise this question.

In this connection, it should be observed at the outset that no claim can arise that the school children themselves are deprived, by this law, of liberty without due process of law. It will be admitted by all that children under sixteen years of age cannot be given liberty of choice as to their education; this must be under the control either of the state, or of their parents, or of both the state and their parents.

If any persons have been deprived of liberty without due process of law it is the parents of the school children. The determination of this last point brings us to the question of the respective authority of the state and of parents over minor children.

Even in the freest country no person can possess absolutely uncontrolled liberty, either with respect to himself personally, or to his children.

It may be probably taken as admitted that a parent cannot be held to have a more complete right of con-

trol over the actions of his child than over his own actions.

> "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will." (*Crawley* v. *Christensen,* 137 U. S. 86, 34 L. Ed. 620.)
>
> "But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy." (*Jacobson* v. *Massachusetts,* 197 U. S. 11, 49 L. Ed. 643.)

Under all governments, even those which are the most free and democratic in their character, the citizen must always owe duties to the state; and it necessarily follows that the state has an interest in making it certain (which can only be done by appropriate legislation) that the citizen is fitted, both in mind and body to perform these duties.

In the case of *Jacobson* v. *Massachusetts* (197 U. S. 11; 49 L. Ed. 643), the Supreme Court of the United States carefully discussed the meaning of "liberty" as guaranteed by the Fourteenth Amendment: "The liberty secured by the Fourteenth Amendment, this

court has said, consists, in part, of the right of a person 'to live and work where he will' (*Allgeyer* v. *Louisiana,* 165 U. S. 578; 41 L. Ed. 832; 17 Sup. Ct. Rep. 427); and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense. It is not, therefore, true that the power of the public to guard itself against imminent danger depends in every case involving the control of one's body upon his willingness to submit to reasonable regulations established by the constsituted authorities, under the sanction of the State, for the purpose of protecting the public collectively against such danger."

In the case of *Mayor, etc. of New York* v. *Miln* (11 Peters 102, 97 L. Ed. 648), the Supreme Court of the United States said:

> "We think it as competent and as necessary for a State to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it is, to guard against the physical pestilence which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be laboring under an infectious disease."

The discretionary powers of a state are broad enough to permit it to decide that compulsory attendance at public schools is a proper "precautionary measure against the moral pestilence of paupers, vagabonds, and possibly convicts."

The voters of Oregon who adopted the new School Law for their State had the right to base their action on the belief that the fact that the great increase in

juvenile crime in the United States followed so closely after the great increase in the number of children in the United States who were not attending public schools, was more than a coincidence.

The voters in Oregon might also have based their action in adopting this law upon the alarm which they felt at the rising tide of religious suspicions in this country, and upon their belief that the basic cause of such religious feelings was the separation of children along religious lines during the most susceptible years of their lives, with the inevitable awakening of a consciousness of separation, and a distrust and suspicion of those from whom they were so carefully guarded. The voters of Oregon might have felt that the mingling together, during a portion of their education, of the children of all races and sects might be the best safeguard against future internal dissensions with the consequent weakening of the community against foreign dangers.

In the case of *Mayor, etc. of New York* v. *Miln* (*supra*), the Supreme Court was considering the evil effects upon a State of the immigration of ignorant foreigners, unacquainted with and lacking in sympathy with, American institutions and ideals. In this connection, it should be remembered that the vast majority of children not now attending the Public Schools of Oregon who will be compelled to do so by the new statute, are either themselves immigrants or the children of immigrants.

Surely a State can require of all immigrants admitted to all the advantages and opportunities of life in the United States, that their children may be taught by the State the English language, and the character of American institutions and government.

Those who assert the unconstitutionality of the Oregon School Law appear to rely to a great extent upon the decision in *Meyer* v. *Nebraska*, 262 U. S. 390, 67 L. Ed. 1042. The Nebraska law therein held unconstitutional, however, was a law of a very different character from the Oregon School Law. The Nebraska law forbade the study of certain subjects; the Oregon Law commands the study of certain subjects to be specified by the State.

The case of *Meyer* v. *Nebraska* merely decided that the parents had some rights of control over the education of their children; the court is now asked to render a decision the practical effect of which will be that the States will be deprived of any control over education, as the degree of control over private schools which the opponents of the Oregon School Law would concede to the States is a merely nominal one, of no practical importance.

The compulsory attendance of all children of school age at the public schools during the relatively short hours during which these schools are in session would not deprive the parents of any just rights. There would remain an abundance of time and opportunity for supplementary instruction either in religion or in the language, history, and traditions of the land of their ancestors. The objectionable feature about the Nebraska law was that it forbade the teaching of modern languages either in regular schools, or in supplementary schools.

That supplementary schools of the kind referred to may successfully function in connection with the regular public schools is not a matter of speculation or doubt; it has already been proved by the success

of such schools as the supplementary Jewish schools in New York City.

The defendants in error particularly rely upon the following dicta in this case of *Meyer* v. *Nebraska:*

> "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Citing Slaughter House Cases, 16 Wall. 36, 21 L. Ed. 394; Butchers' Union S. H. & L. S. L. Co. *v.* Crescent City L. S. L. & S. H. Co., 111 U. S. 746, 28 L. Ed. 585, 4 Sup. Ct. Rep. 652; Yick Wo. *v.* Hopkins, 118 U. S. 356, 30 L. Ed. 220, 6 Sup. Ct. Rep. 1064; Minnesota *v.* Barber, 136 U. S. 313, 34 L. Ed. 455, 3 Interstate Commerce Rep. 185, 10 Sup. Ct. Rep. 862; Allgeyer *v.* Louisiana, 165 U. S. 578, 41 L. Ed. 832, 17 Sup. Ct. Rep. 427; Lockner *v.* New York, 198 U. S. 45, 49 L. Ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Twining *v.* New Jersey, 211 U. S. 78, 53 L. Ed. 97, 29 Sup. Ct. Rep. 14; Chicago, B. & Q. R. Co. *v.* McGuire, 219 U. S. 549, 55 L. Ed. 328, 31 Sup. Ct. Rep. 259; Truax *v.* Raich, 239 U. S. 33, 60 L. Ed. 131, L. R. A. 1916 D, 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917 B, 283; Adams *v.* Tanner, 244 U. S. 590, 61 L. Ed. 1336, L. R. A. 1917 F, 1163, 37 Sup. Ct. Rep. 662, Ann. Cas. 1917 D, 973; New

York L. Ins. Co. *v.* Dodge, 246 U. S. 257, 62 L. Ed. 772, 38 Sup. Ct. Rep. 337, Ann. Cas. 1918 E, 593; Truax *v.* Corrigan, 257 U. S. 312, 66 L. Ed. 254, 27 A. L. R. 375, 42 Sup. Ct. Rep. 124; Adkins *v.* Children's Hospital (April 9, 1923) 261 U. S. 525, 67 L. Ed. 785, 24 A. L. R. 1238, 43 Sup. Ct. Rep. 394; Wyeth *v.* Board of Health, 200 Mass. 474, 23 L. R. A. (N. S.) 147, 128 Ann. St. Rep. 439, 86 N. E. 925.

The dicta in this case would appear to be somewhat broader than can be supported by the previous decisions of the United States Supreme Court which are cited to support it, as will be seen by a study of these decisions. There cannot be found in any of them or in any other decision ever rendered by the Supreme Court either any direct decision, or any expression of opinion, that the Fourteenth Amendment gives the Federal Courts any power to interfere between a State and its citizens relative to questions of religion, education, or domestic relations including the question of the division of the power of control over children between their parents and the state.

As to the first of these three matters the question has been directly decided to the contrary by the United States Supreme Court. See *Permoli* v. *First Municipality,* 3 Howard 309, 11 L. Ed. 739, in connection with the many decisions that the Fourteenth Amendment did not have the effect of making the first eight amendments limitations upon the powers of the States.

The reason why there have been no direct adjudications by the United States Supreme Court on the questions of Federal control over education or domestic relations is that these matters have been so uni-

versally recognized as being entirely within the field of state control that no one has previously considered it worth while to take up such a question for the adjudication of this court. Even the numerous lawyers who have held such extravagant ideas as to the extent of the application of the Fourteenth Amendment have never conceived the idea that it could be stretched to such an extent as this. It would be hard to name two subjects which by their inherent characters naturally fall more clearly within the jurisdiction of the states and outside of that of the Federal Government.

If the states are to be deprived of their powers over education and domestic relations it is hard to see what powers can be logically left to them, and they would appear to be on a rapid journey toward a political status similar to that of a British County.

The decision in the *Slaughter House Cases, supra,* conclude with the following words:

> "Whatever fluctuations may be seen in the history of public opinion on this subject during the period of our national existence, we think it will be found that this court, so far as its functions required, has always held, with a steady and an even hand the balance between State and Federal power and we trust that such may continue to be the history of its relation to that subject so long as it shall have duties to perform which demand of it a construction of the Constitution, or of any of its parts."

A continuation of this policy in deciding the present case, will protect the states from the most far-reaching attacks upon their powers and rights which have been made for many years. If the majority of the states,

now or at any time in the future feel that any state has abused its control over religion or education, the constitution provides one, and only one, remedy. This is the remedy which was used for the abolition of slavery and which is at present being sought for the matter of child labor.

Military service is not the only form of service, which a state can demand of its citizens.

> "In view of ancient usage and the unanimity of judicial opinion it must be taken as settled that unless restrained by some constitutional limitation, a state has inherent power to require every able-bodied man within its jurisdiction to labor for a reasonable time on public roads near his residence without direct compensation. This is a part of the duty which he owes to the public." (Butler *v.* Perry, 240 U. S. 326, 60 L. Ed. 672.)

Other forms of service, e. g., jury service, for which a state can call upon its citizens, will readily suggest themselves.

The demand of the state for a portion of the time of each child in order to prepare the child for the duties of good citizenship, is manifestly a far less onerous, but no less important, one than those above considered.

The subject of immigration is one which is exclusively under the control of the central government. The states have nothing to say as to the number or class of the immigrants who may be permitted to settle within their limits. It would therefore appear to be both unjust and unreasonable to prevent the states from taking the steps which each state may deem necessary and proper for Americanizing its new imigrants

and developing them into patriotic and law-abiding citizens.

The requirement of universal attendance in the public schools would seem to be clearly one of the methods within the discretion of the state for the accomplishment of this purpose.

In considering the necessity and propriety of such action it is necessary to consider not only the classes of private schools now in existence but also the kinds of private schools which may be established in the future.

At present the vast majority of the private schools in the country are conducted by members of some particular religious belief. They may be followed, however, by those organized and controlled by believers in certain economic doctrines entirely destructive of the fundamentals of our government.

If the Oregon School Law is held to be unconstitutional it is not only a possibility but almost a certainty that within a few years the great centres of population in our country will be dotted with elementary schools which instead of being red on the outside will be red on the inside.

Can it be contended that there is no way in which a state can prevent the entire education of a considerable portion of its future citizens being controlled and conducted by bolshevists, syndicalists and communists?

The exact question involved in the present case has never been passed upon by any American court. Perhaps the cases which come the nearest to touching the questions involved in this case are those on the question whether the school authorities have the right to exclusive control over the list of studies to be taken by pupils in the public schools or whether the parents have a limited right of selection. The decisions on this

question are in hopeless conflict. In New Hampshire (*Kidder* v. *Chelis*, 59 N. H. 473; Indiana (*State* v. *Webber*, 108 Ind. 31, 8 N. E. 708) and Iowa (*State* v. *Mizner*, 50 Ia. 145) it has been held that the power of the public is exclusive, while in Illinois (*School Trustees* v. *People*, 87 Ill. 303); Oklahoma (*School Board District* v. *Thompson*, 24 Okla. 1); and Wisconsin (*Morrow* v. *Wood*, 35 Wis. 59) some right of control has been held to belong to the parent.

In all of these cases, however, all parties have apparently agreed in holding that the state had at least a superior right in the matter, and that the question was one over which the state courts had exclusive jurisdiction. No attempt has ever been made to bring up any of these cases for review by the United States Supreme Court.

Attention is also again, in this connection, called to the case of *Eadleigh* v. *Newhall*, 136 Fed. 941, holding that parents have no right to the custody of their infant children, except subject to the paramount right of the state, to be exercised whenever deemed for the best interest of the children.

The Supreme Court of the United States has twice recently, in the child labor cases (*Hammer* v. *Dagenhart*, 247 U. S. 251, 62 L. Ed. 1101; and *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20, 66 L. Ed. 817) held that all questions relative to the care, control and custody of minor children belong exclusively to the state. In the former of these cases the court said:

> "In interpreting the Constitution it must never be forgotten that the nation is made up of states, to which are intrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national govern-

ment are reserved. Lane County *v.* Oregon, 7 Wall. 71-76, 19 L. Ed. 101-104. The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government. Mayor, etc. of New York *v.* Miln, 11 Peters 102-139, 9 L. Ed. 648-662; Slaughter House Cases, 16 Wall. 36-63, 21 L. Ed. 394-404; Kidd *v.* Pearson, *supra.* To sustain this statute would not be in our judgment, a recognition of the lawful exertion of Congressional authority over interstate commerce, but would sanction an invasion by the Federal power of the control of a matter purely local in its character, and over which no authority has been delegated to Congress in conferring the power to regulate commerce among the states.

"We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations, and not by an invasion of the powers of the states This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and State, to the end that each may continue to discharge harmoniously with the other, the duties intrusted to it by the Constitiution.

"In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities *to regulate the hours of labor of children* in factories and mines within the state—*purely state authority.*"

If the legislative department of the Federal Government cannot interfere in matters relative to child

labor, how can the judicial department of the Federal Government interfere in matters relative to the education of children?

Is the Supreme Court of the United States prepared to hold that four or five hours a day attendance at a public school during forty weeks in a year is a greater evil to a child than eight or ten hours a day work in a factory during perhaps every week in the year? Such an inference would be clearly included in a decision by the court holding the Oregon School Law unconstitutional.

The Oregon School Law does not deny the Equal Protection of the Law.

It is further charged that this amendment violates the constitutional provision that "no state . . . shall deny to any person within its jurisdiction the equal protection of the laws."

So far from there being any merit in this charge the truth of the matter is that the whole opposition to the new law arises from the fact that it is intended to bring about a greater equality in the operation of the school law of Oregon than has previously existed.

A law which increases the uniformity of the application of a law cannot by any stretch of the imagination be classed as a law which denies the equal protection of the law. The new Oregon School Law merely removes an exception to the generality of the application of the former law.

All state legislatures have the right to make exceptions to the application of a general law, provided such exceptions are based upon some logical and reasonable classification. Such power of classification, however, is a discretionary right and never a mandatory duty.

The right to the equal protection of the laws is not denied when it is apparent that the same law or course

of procedure is applicable to every other person in the state under similar circumstances and conditions.

Walston v. *Nevin*, 128 U. S. 582, 32 L. Ed. 544;
Tinsley v. *Anderson*, 171 U. S. 106, 43 L. Ed. 91, 18 Sup. Ct. Rep. 805;
Williams v. *Arkansas*, 217 U. S. 79, 54 L. Ed. 673, 30 Sup. Ct. Rep. 493.

The Decision in the District Court.

In the decision rendered in the District Court of Oregon the judges, after arguing the case mainly on the question of the deprivation of liberty wthout due process of law, in which discussion they avowedly proceed on the assumption that the Fourteenth Amendment protects the liberty of artificial persons equally with the liberty of natural persons, decide the case solely on the question of the deprivation of property without due process of law. Adding,

> "Other questions have been presented, but, their decision not being necessary to a determination of the controversy involved, they are not considered."

Apparently appreciating that their decision in this case was entirely without backing of any legal precedent, the judges declare in their opinion: "That the writ may be novel, or is without precedent, is not a fatal objection to its use."

The only judicial foundation for this position which they produce is a half sentence of dicta, boldly torn from its context and stripped of the explanatory and qualifying statements which surround it, from an early Illinois case which decided that equity courts had the

power to order the sale of a lunatic's real estate. *Dodge* v. *Cole*, 97 Ill. 338, 364, 37 Am. Rep. 111.

This is supplemented by a single sentence from Corpus Juris which is quoted as if it was a statement of a general principle, while in reality it is used in Corpus Juris as a qualifying statement in connection with a preceding general statement.

This can be perhaps best shown by quoting the whole section from Corpus Juris with the portion cited in the decision of this case in the District Court underlined.

> "While it has been said that the writ of injunction will not be awarded in new and doubtful cases not coming within the well established principles of equity, yet the absence of precedent, although not to be overlooked entirely does not of itself determine questions of jurisdiction. It is not a fatal objection that the use of the writ for the particular purpose for which it is sought is novel. *Courts may amplify remedies and apply rules and general principles for the advancement of substantial justice.* If this was not so, and courts were confined to particular precedents, there would be no power to grant relief in new cases constantly occurring." 32 Corpus Juris N. 34, No. 13.

One case only is cited in Corpus Juris in support of the principle stated in the sentence cited in the opinion in the lower court. This is the case of *Hamilton* v. *Whitridge*, 11 Maryland 128, 69 American Decisions 184, where an injunction was sought against the opening of a house of prostitution. The opinion in this case was in part as follows:

> "As was observed by the appellant's counsel, no decision has been found in which the power

was exercised in such cases as the present. Nor is there any in which the writ of injunction had been applied for and denied. But the absence of precedents, though not to be overlooked entirely, does not, of itself determine questions of jurisdiction. We consult adjudged cases to ascertain their reason and spirit. These are the foundation of the law. Salmon *v.* Clagett, 3 Bland 133; Fisher *v.* Prince, 3 Burr 1364; Rust *v.* Cooper, Cowp. 632.

"Courts are not to assume jurisdiction, but they may employ remedies and apply rules and general principles for the advancement of substantial justice. Broom's Leg. Max. 36; 50 Law Lib. 50; Russell *v.* Smyth, 9 Mee. & W. 818, per Lord Abinger. If this were not so, and courts were confined to particular precedents, there would be no power to grant relief in new cases constantly occurring. And hence, when they do arise, and rights can be asserted or wrongs prevented or redressed consistently with established principles, it would be a great failure of justice to deny relief merely because no decision could be found in which the jurisdiction has been invoked and exercised. The point on this appeal, then, is not whether an injunction has ever issued, to prevent the establishment of a public nuisance of this kind, but whether the doctrines of equity applicable to nuisances should be applied to the present case".

The citations, therefore, relied upon which the decision in the District Court are partly based merely go to the extent of holding that where equity jurisdiction is clearly established in a general class of cases, it may be granted in cases the exact facts on

which have never arisen in a previous case, but which fall within the general class.

This appears as a slim foundation for a decision which would strip a state of such large fields of jurisdiction which have previously been conceded to them.

The point here raised by the District Court is, moreover, entirely immaterial, as the question is not as to the extent of the jurisdiction of the court as an equity court, but as to the extent of the jurisdiction of the court as a Federal court.

If the Compulsory School Laws of the Other States of the United States are Constitutional, the New Oregon School Law must be held Constitutional.

In its decision in *Meyer* v. *Nebraska,* 262 U. S. 390, 67 L. Ed. 1042, the Supreme Court said: "The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports."

Apparently no one has yet disputed the truth of the legal principles contained in this citation. A careful analysis of the above statement shows that it sustains the constitutionality of the new Oregon School Law.

Classification in a state statute is a right possessed by a state which they may exercise at their discretion; it is not a duty forced upon them.

If a state may pass a law applying to a certain portion of the things or persons included in a general class, it can pass one applying to all in a general class, unless express exceptions are to be found in the prohibitions in the Federal Constitution.

This has been positively decided by the United States Supreme Court. In *Fisher* v. *St. Louis,* 194 U. S. 361, 48 L. Ed. 965, the Court said:

> "Defendant's objection to ordinance, that it is made to apply to the whole city, when authority was only given by the charter to prohibit the erection of cow stables and dairies 'within prescribed limits', is equally without foundation. If it were possible to prescribe limits for the operation of the ordinance it was held by the Supreme Court to be equally possible to declare that those limits should be coincident with the limits of the city. This is also a non-Federal Question."
>
> Again in Truax *v.* Raich, 239 U. S. 33, 60 L. Ed. 131, the court said: "We have frequently said that the legislature may recognize degrees of evil and adapt its legislation accordingly, but underlying the classification is the authority to deal with that at which the legislation is aimed."

The states do not hold any power solely in the alternative. This idea of alternative power is absolutely necessary to sustain the position of the defendants in error, but such an idea has been hitherto unheard of in constitutional law or in the common law.

If a state has the power to command its citizens to do one of two things this is, and can only be, because it could compel them to do either, or because, at the very least, it has the right to compel absolutely and unconditionally one of these things, and offers the other as an optional course of conduct.

Even the opponents of the Oregon School Law could hardly contend that existing compulsory school attendance laws are constitutional on the theory that the State has the right to compel universal attendance

at private schools, and merely offers to accept attendance at the public schools as an optional substitute. The lack of any certainty as to the universal availability of private schools is enough to show the impossibility of relying on this theory. Laws compelling compulsory attendance at school were never adopted, either in this country or in England, before the creation of a public school system. But if this theory is to be rejected, the only alternative theory, upon which any kind of a compulsory school law can be sustained, is the adoption of the principle that a state can compel universal attendance of children of school age at the public schools and may offer to accept attendance at a private school as an optional substitute.

The amazing theory that a state may compel people to do one of two things when it could not compel them to do either one by itself, is a new legal principle without support either in the United States Constitution, the Common Law, or the fundamental principles of jurisprudence, which the defendants in error in this case are asking the Supreme Court to create for the purposes of this particular case.

Affirmative Defence of the Oregon School Law.

Not only can the new Oregon School Law be successfully defended against all the allegations of unconstitutionality which have been made against it, but it can also be affirmatively defended not only as a proper exercise of one of those powers expressly reserved to the States by the Tenth Amendment, but also both as a proper exercise of the police power of the state, and of the powers of the state in connection

with its duties to aid the United States in time of war.

(A) The constitutionality of the new Oregon Public School Law can be sustained as an exercise of the police power of the State. The United States Supreme Court has repeatedly decided that the scope of this power is a very broad one.

Thus Mr. Justice Harlan in delivering the opinion of the Supreme Court in the case of *Chicago, B. & Q. R. Co.* v. *Illinois*, 200 U. S. 561, 592, 50 L. Ed. 596, 609, 26 Sup. Ct. Rep. 341, said in relation to the scope of the police power:

> "The learned counsel for the railway company seem to think that the adjudications relating to the police powers of the state to protect the public health, the public morals, and the public safety are not applicable, in principle, to cases where the police power is exerted for the general wellbeing of the community apart from any question of the public health, the public morals, or the public safety. Hence, he presses the thought that the petition in this case does not, in words, suggest that the drainage in question has anything to do with the health of the drainage district, but only avers that the system of drainage adopted by the Commissioners will reclaim the lands of the district, and make them tillable or fit for cultivation. We cannot assent to the view expressed by counsel. We hold that the police power of a state embraces regulations designed to promote *the public convenience or the general prosperity*, as well as regulations designed to promote the public health, the public morals, or the public safety." Citing Lake Shore & M. S. R. Co. *v.* Ohio, 173 U. S. 285, 292, 43 L. Ed. 702, 704, 19 Sup. Ct. Rep. 564; Silman *v.* Philadelphia, 3 Wall. 713, 729, 18 L. Ed. 96, 100; Pound *v.* Turck, 95 U. S. 269, 274, 24 L. Ed.

525, 527; Hannibal, St. J. R. Co. *v.* Husen, 95 U. S. 470.

In *Bacon* v. *Walker,* 204 U. S. 311, 51 L. Ed. 499, the United States Supreme Court referred to the case of *Chicago, B. & Q. R. Co.* v. *Illinois,* 200 U. S. 561, 592, 50 L. Ed. 596, 609, 26 Sup. Ct. Rep. 341, and continued:

> "In that case we rejected the view that the police power cannot be exercised for the general well-being of the community. That power, we said embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety."

Again in *Lewton* v. *Steele,* 153 U. S. 135, 382 L. Ed. 385, it was said:

> "The extent and limits of what is known as the police power have been a fruitful subject of discussion in the appellate courts of nearly every state in the Union . . . Under this power it has been held that the state may order . . . the compulsory vaccination of children."

In the case of *Mayor, etc. of New York* v. *Miln* (11 Peters 102, 9 L. Ed. 648), already referred to, Mr. Justice Thompson, one of the justices upholding the decision of the majority of the court, said:

> "Can anything fall more directly within the police power and internal regulation of a State than that which concerns the care and management of paupers or convicts, or any other class or description of persons that may be thrown into the country, and likely to endanger its safety, or become chargeable for their maintenance? It is not intended by this remark to cast any re-

proach upon foreigners who may arrive in this country. But if all power to guard against these mischiefs is taken away, the safety and welfare of the community may be very much endangered."

In connection with this last quotation it may be asserted that no class of persons are so "likely to endanger its safety, or become chargeable for their maintenance" as those who have been left uneducated or been improperly educated.

(B) This law may also be sustained under the powers of the state in connection with its duties to aid the United States in time of war. The right of the United States to call upon its citizens for military services to any extent for the wars waged by the United States, either at home or abroad, was strongly asserted by the United States Supreme Court in a line of decisions rendered during the recent war.

Arver v. *United States,* 245 U. S. 366, 52 L. Ed. 349;

Holdman v. *United States,* 245 U. S. 474, 62 L. Ed. 410;

Ruthenberg v. *United States,* 245 U. S. 480, 62 L. Ed. 414;

Cox v. *Wood,* 247 U. S. 3, 62 L. Ed. 947;

Frohwerk v. *United States,* 249 U. S. 204, 63 L. Ed. 54;

Debe v. *United States,* 249 U. S. 211, 63 L. Ed. 666;

McKinley v. *United States,* 249 U. S. 397, 63 L. Ed. 668.

The power to declare war is exclusively in the United States government, *but the power and duty to keep in a state of preparedness for war is shared by the state governments.*

In *Gilbert* v. *Minnesota,* 254 U. S. 325, 65 L. Ed. 257, the United States Supreme Court was called upon to pass on the constitutionality of a statute of Minnesota providing, in part, that:

> "It shall be unlawful for any person to *teach* or advocate by any written or printed matter whatsoever, or by an oral speech, that the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States."

In the decision upholing the constitutionality of this statute, it was said by the court:

> "Undoubtedly, the United States can declare war, and it, not the states, has the power to raise and maintain armies. But there are other considerations. The United States is composed of the states, the states are constituted of the citizens of the United States, who also are citizens of the states, and it is from these citizens that armies are raised and wars waged, and whether to victory and its benefits, or to defeat and its calamities, the states as well as the United States are ultimately concerned. And whether to victory or defeat depends upon their morale, the spirit and determination that animate them,—whether it is repellent and adverse or eager and militant,—and to maintain it eager and militant against attempts at its debasement in aid of the enemies of the United States is a service of patriotism, and from the contention that it encroaches upon or usurps any power of Congress, there is an instinctive and immediate revolt. And so with the statute of Minnesota. An army is an instrument of government, a necessity of its power and honor, and it may be, of its security. An army, of course, can only be raised and directed by Congress; in

neither has the state power, but it has power to regulate the conduct of its citizens, and to restrain the exertion of baleful influence against the promptings of patriotic duty, to the detriment of the welfare of the nation and state. To do so is not to usurp a national power, it is only to render a service to its people, as Nebraska rendered a service to its people when it inhibited the debasement of the flag."

In *Halter* v. *Nebraska* (205 U. S. 34, 51 L. Ed. 696), the United States Supreme Court, in upholding the constitutionality of an act of the State of Nebraska prohibiting the use of the United States flag for advertising purposes, said in part:

"So, a State may exert its power to strengthen the bonds of the Union, and therefore, to that end, may encourage patriotism and love of country among its people. When, by its legislation, the state encourages a feeling of patriotism towards the nation, it necessarily encourages a like feeling toward the state. One who loves the Union will love the state in which he resides . . .

"As the statute in question evidently had its origin in a purpose to cultivate a feeling of patriotism among the people of Nebraska, we are unwilling to adjudge that in legislation for that purpose the state erred in duty, or has infringed the constitutional right of anyone. On the contrary, it may reasonably be affirmed that a duty rests upon each state in every legal way to encourage its people to love the Union with which the state is indissolubly connected. . . .

"It would be going very far to say that the statute in question had no reasonable connection with the common good and was not promotive of the peace, order, and well-being of the people.

> Before this court can hold that statute void it must say that, and, *in addition,* adjudge that it violates rights secured by the constitution of the United States. We cannot so say and cannot so adjudge."

The discretion of the states in the exercise of their powers is broad enough to justify a state in holding that a compulsory system of public school education will encourage the patriotism of its citizens, and train its younger citizens to become more willing and more efficient defenders of the United States in times of public danger.

This is particularly true in view of the fact that if the Oregon School Law is declared unconstitutional there will be nothing to prevent the establishment of private schools, the main purpose of which will be to teach disloyalty to the United States or at least the theory of the moral duty to refuse to aid the United States even in the case of a defensive war.

CONCLUSION.

In the preceding sections it has been shown:

I. That the Governments of the several states in the Union possess all those governmental powers which they have not surrendered by the United States Constitution;

II. That the New Oregon Public School Law is not a violation of any provision in the United States Constitution; and

III. That the passage of the Act in question can be sustained under any one of two great rights or groups of rights, possessed by the governments of each of the states.

In conclusion it is only necessary to say a word concerning the great, and far reaching, evils which

would result from a decision declaring the law in question to be unconstitutional and void.

If the governments of the several states have no power to provide for the education of the children within its limits, and if the character of the education of such children is to be entirely dictated by the parents of such children, or by those persons by whose influence the parents are controlled, it is hard to assign any limits to the injurious effect, from the standpoint of American patriotism which may result. For example children may be taught that their true allegiance is to some country other than the United States, that the claims upon them of the religion to which they belong are superior to the claims of the United States, that it is wrong to take up arms in defence of the United States, that the Government of this country is a wicked and tyrannical one, or they may be intentionally mistaught as to the true character of the government and history of the United States. The extreme distortions of truth on these subjects which have been circulated throughout the United States in recent years would be ludicrous if they were not so tragic.

Moreover, if the new Oregon School Law is declared to be in violation of the Constitution of the United States there is no legal principle on which any existing public school law in the United States can be upheld. If a state cannot compel certain children to attend the public schools it cannot compel any children to do so. An attempt to do so would be clearly a violation of the "equal protection of the laws" clause of the Fourteenth Amendment.

While proper classification of the subjects to which a law is to apply may be constitutional, a law which

is unconstitutional without classification cannot be made constitutional by classification, with the single exception of cases where the classification is based upon the division of powers between the state and Federal governments.

The whole matter may be summed up in the single statement that the regulation of education is a subject over which the states have exclusive control and with which the Federal government has no authority to interfere. If there is anything objectionable with a state law on the subject of education the remedy must be sought in the state courts or by action of the state electorate. It is a problem which each state must, and should, be left to settle for itself. Local conditions in a few states may render laws necessary or advisable which would be unnecessary and inadvisable in the other states. Particularly should a question of such delicacy as the present one be left for each state to decide for itself. If this question is brought within the field of Federal control it can only mean the spread of this bitter question all over the United States in the conflict over another proposed amendment to the Constitution. The court might almost take judicial notice of the certainty of the introduction of such an amendment in case the Oregon Law is declared unconstitutional. It is to be hoped that some vestiges of sovereign power may continue to be left to the state governments.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

No. 583.

WALTER M. PIERCE, as Governor of the State of Oregon; ISAAC H. VAN WINKLE, as Attorney General of the State of Oregon, and STANLEY MYERS, as District Attorney for Multnomah County, State of Oregon, *Appellants*,

vs.

THE SOCIETY OF THE SISTERS OF THE HOLY NAMES OF JESUS AND MARY, *Appellee*.

No. 584.

WALTER M. PIERCE, as Governor of the State of Oregon; ISAAC H. VAN WINKLE, as Attorney General of the State of Oregon, and STANLEY MYERS, as District Attorney for Multnomah County, State of Oregon, *Appellants*,

vs.

HILL MILITARY ACADEMY, *Appellee*.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

SUPPLEMENT TO BRIEF OF APPELLANT, THE GOVERNOR OF THE STATE OF OREGON.

AMBIGUOUS AND POSSIBLY MISLEADING STATEMENT IN BRIEF OF APPELLEE, THE SOCIETY OF THE SISTERS OF THE HOLY NAMES OF JESUS AND MARY.

In the above mentioned brief the following statement is made on page 71: "In Taylor and Marshall *v.* Beckham (No. 1), 178 U. S. 548, 602-3, Mr. Justice Harlan said: etc." While this statement is technically correct the counsel failed to explain (presumably through oversight) that the

opinion of Mr. Justice Harlan was a dissenting opinion in which no other justice concurred. Even the other justice who dissented in this case did not give his approval to the extreme view of the law contained in the quotation from Mr. Justice Harlan's opinion which is quoted in the above mentioned brief.

ERRONEOUS STATEMENTS CONTAINED IN THE BRIEF OF APPELLEE, HILL MILITARY ACADEMY.

On page 26 of this Brief it is stated: "The reports of the Bureau of Education of the Department of the Interior of the United States, show a total enrollment in all private schools of 184,153. Of this number, 130,019 were in private schools conducted by religious denominations."

The facts of the case are that the "Bi-Annual Survey Bulletin, 1918-20," published by the Bureau of Education of the Department of the Interior of the United States, gives the following totals for the attendance at the time of the compilation of the bulletin in private schools, below collegiate grade, in the United States:

Elementary Schools.....	1,485,561
Secondary Schools.....	213,920
Commercial & Business Schools...	335,161
	2,034,642

This total is a little more than eleven times the number stated in appellee's brief.

More serious mistakes, which apparently arise out of a misunderstanding of the appellant's brief, are found in the following quotations from appellee's brief:

> "The Governor and Attorney General, while admitting that the purpose of the act is to compel attendance at public schools *and thus prevent children from attending private schools*, etc." page 11.

> "No interpretation can be placed upon this act other than it is intended to prevent children between the ages of eight and sixteen years and in the elementary grades from attending private schools. That is its plain meaning and intent *and that is the interpretation placed upon it by appellants in this case.*" page 14.

This most emphatically is *not* the interpretation placed upon this statute by the appellants. The attitude, on this point, of the appellant Walter M. Pierce is set out in the last 15 lines of p. 41 and the first two lines of page 42 of the brief filed in his behalf.

The State of Oregon has never claimed and does not claim any monopoly in the education of any child under its jurisdiction.

The new Oregon School Law does not deprive any parent of the right to have his views on religion, or any other subqect, taught to his child by any teacher he may select.

The law does guarantee the privilege and right of every child to receive a *portion* of his education under such environments as will render it free from class or religious bias.

It is argued in both briefs filed in behalf of the appellees that supplemental education would be impossible under the new Oregon School Law. The truth of the matter is, however, that the practicability of supplemental schools for religious education, working in co-operation with the public schools, or by the side of the public schools, has been so well established by practical experience as to be no longer a matter of doubt or speculation. Hundreds, probably thousands, of such schools are today in successful operation; and the number is being increased almost daily. Those who seek to create a monopoly of education are to be found among the opponents, not the supporters, of the new Oregon School Law.

Attention is called to the following ambiguous and perhaps misleading statement which is advanced in the brief of counsel for The Society of the Sisters of the Holy Names of Jesus and Mary as an (at page 78) argument to show that supplemental schools, or instruction in connection with the public schools would be impossible: "In Meyer *v.* Nebraska, 262 U. S. 390, 398, the following was quoted from the court below: 'The hours which a child is able to study in the confinement of school are limited. It must have ample time for exercise or play. Its daily capacity for learning is comparatively small.' "

While this is a portion of a quotation made by the Su-Supreme Court from the decision of the court below, attention is called to the fact that the Supreme Court made this quotation from the decision of the state court for the purpose of recording its disapproval of it.

THE IMPAIRMENT OF THE OBLIGATION OF CONTRACTS.

Counsel for the Hill Military Academy does not seriously raise the question in this Court of the impairment of the obligation of contracts, saying (pp. 2 and 3 of his brief): "The bill of complaint in this case alleges that the act in question is unconstitutional and void in several particulars, but in presenting the case to the lower court, this appellee relied wholly upon the proposition that the act is in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it deprives this appellee of its property without due process of law. We rely upon that ground in this court."

On the other hand, counsel for the appellee, The Society of the Sisters of the Holy Names of Jesus and Mary, attempt to argue that the statute impairs the obligation of the contract embodied in the plaintiff's corporate charter, basing this position upon the decision in the *Dartmouth College* case.

The rule in the *Dartmouth College* case is too well known to need discussion, but equally well known and authentic is the limitation, or perhaps better the explanation, of this rule which was set out by this Court in the cases of, *The Provident Bank* v. *Billings & Pittman,* 4 Pet, 514, 7 L. ed. 934, and *The Charles River Bridge* v. *The Warren Bridge,* 11 Pet. 420, 9 L. ed. 773.

In these cases this Court laid down the doctrine, never since abandoned, that the obligation of the charter of a corporation was not impaired by any loss, however serious or certain, which a corporation might suffer as the indirect result of the exercise of a proper governmental function by the State which chartered it.

In the latter of these cases, the Court said:

> "The continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform, transferred to the hands of privileged corporations. The rule of construction announced by the court (i. e. in The Provident Bank *v.* Billings & Pitman, 4 Pet. 514) was not confined to the taxing power, nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving undiminished, the power then in question; and whenever any power of the State is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies and the rule of interest must be the same."

This is closely connected with the doctrine that a State cannot contract away by charter its police powers. See *Northwestern Fertilizer Co.* v. *Hyde Park,* 97 U. S. 672, 24 L. ed. 1040, and *Stone* v. *Mississippi,* 101 U. S. 819, 25 L. ed. 1080.

The attempt to differentiate the present case from the case of *Berea College* v. *Kentucky,* on account of the difference in the corporation laws of Oregon and Kentucky, completely fails in view of the decision of this Court in the case of *The Oregon Railway & Navigation Company* v. *The Oregon Railway Company,* 130 U. S. 1, 32 L. ed. 837, in which the Court construed the provision of the Oregon Constitution, upon which the appellee bases his argument, very strongly in favor of the preservation of the rights of the State, and against the presumption of vested interests in favor of the corporation.

DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW.

The great legal principle laid down in the case of *The Charles River Bridge* v. *Warren Bridge, supra,* applies with equal force where it is claimed that a state law deprives a person of property without due process of law. No person can be held to be deprived of property without due process of law by any loss which he may suffer as the indirect result of the exercise of a proper governmental function by a State, regardless of how certain or how serious this loss may be.

This is clearly shown by the decision in the case of *Laurel Hill Cemetery* v. *City & County of San Francisco,* 216 U. S. 358, 54 L. ed. 515.

The facts in this case were set out in the decision as follows: "This is an action to restrain the City and County of San Francisco and its officers from enforcing an ordinance forbidding the burial of the dead within the city and county limits. The allegations of the complaint are lengthy, but the material facts set forth are as follows: The plaintiff was incorporated in 1867 as a rural cemetery under a general act. The land in question had been dedicated as a burying ground, being at that time outside the city limits, and a mile or two away from dwellings

and business. It was conveyed to the plaintiff and later a grant of the same was obtained from the city in consideration of $24,139.79, which sum the city retains. The land has been used as a cemetery ever since; forty thousand lots have been sold, and over two million dollars have been spent by the lot owners, and other large sums by the plaintiff, in preparing and embellishing the grounds. By the terms of the above-mentioned general statute the lots, after a burial in them, are inalienable, and descend to the heirs of the owner, and the plaintiff is bound to apply the proceeds of sales to the improvement, embellishment, and preservation of the grounds. There is still land unsold, estimated to be worth $75,000. There now are many dwellings near the cemetery, but it is alleged to be in no way injurious to health, or offensive, or otherwise an interference with the enjoyment of property or life."

It would be hard to imagine a case where the necessary effect of a law was to more clearly destroy the value of property.

Nevertheless the Court unanimously held that the plaintiffs in error had not been deprived of property without due process of law.

The decision was largely based on the well-established principle that the Supreme Court will not hold a state law unconstitutional because of the personal opinions of the members of the Court as to the wisdom, justice or exediency of the law. On this point the Court said in this decision: "If every member of this bench clearly agreed that burying grounds were centers of safety, and thought the board of supervisors and the supreme court of California wholly wrong, it would not dispose of this case. There are other things to be considered. Opinion still may be divided, and if, on the hypothesis that the danger is real, the ordinance would be valid, we should not overthrow it merely because of our adherence to the other belief."

THE FOURTEENTH AMENDMENT DOES NOT PROTECT RIGHTS ARISING OUT OF FAMILY RELATIONS.

The counsel for the appellee, The Society of the Sisters of the Holy Names of Jesus and Mary, contend for a construction of the "due process of law" clause of the Fourteenth Amendment which would bring within its protection every right belonging to man. Broad, however, as the scope of this clause undoubtedly is, it cannot be stretched far enough to satisfy the contention of this appellee. It is now well settled that it does not protect political rights. Another great class of rights which would appear to be just as clearly outside the scope of this clause are those arising out of the family relations, including the rights of parents over their children. This is one class of rights which the Constitution leaves in its entirety to state regulation and state protection.

That the right of a parent to control the education of his children is a property right is not contended by the appellee; but just as untenable is its claim that it is a part of his "liberty" which is protected by the Fourteenth Amendment.

A parent beyond dispute has an important "right" in his power of control over his children, a right which is fully protected by the laws of the different States; but it is a strange perversion of the meaning of the word "liberty" to apply it to a right to control the conduct of others.

This distinction is well brought out by Mr. Cooley, who in his "Treatise on the Constitutional Limitations," refers to the rights which arise out of the family relations, and in particular the right of control of a parent over his child, not as liberties but as "legal *restraints* upon personal liberty." (See edition of 1868, pp. 339-342.)

While the United States Supreme Court has never expressly stated that rights arising out of the family relations were not protected by the "due process of law" clause,

it has tacitly indicated this by its treatment of the divorce cases which have come before it.

In *Andrews* v. *Andrews,* 188 U. S. 14, 32, 47 L. ed. 366, 369, the Court said: "Now, as it is certain that the Constitution of the United States confers no power whatever upon the government of the United States to regulate marriage in the states, or its dissolution, the result would be that the Constitution of the United States has not only deprived the states of power on the subject, but while doing so has delegated no authority in the premises to the government of the United States."

Both in this case and also in the case of *Haddock* v. *Haddock,* 201 U. S. 562, 50 L. ed. 867, the Supreme Court held that there was a lack of jurisdiction in the court which rendered the decree of divorce. If, therefore, these had been cases where "life, liberty, or property" had been involved the court would have held that there had been a denial of "due process of law" and that the judgment of the court was void. In these cases, however, the court did not attempt to apply the provisions of the Fourteenth Amendment and merely decided that the lack of jurisdiction excused the courts of other States from the necessity of recognizing the validity of such judgments under the compulsion of the "full faith and credit" clause of the Constitution. A decision under the "due process of law" clause would have prevented the existing state of confusion as to marriage laws, under which a person may be single in one state and married in another, and it seems safe to assume that these cases would have been decided under this clause had it been possible.

How clearly the rights arising from family relations lacks the protection given to most other civil rights by the Fourteenth Amendment, is indicated by the following extract from the opinion in the case of *Haddock* v. *Haddock, supra,* "Indeed, a personal judgment so rendered is, by operation of the "due process" clause of the 14th Amend-

ment, void as against the nonresident, even in the state where rendered and, therefore, such nonresident, in virtue of the rights granted by the Constitution of the United States, may successfully resist, even in the state where rendered, the enforcement of such a judgment. Pennoyer *v.* Neff, 95 U. S. 714, 24 L. ed. 565."

The Supreme Court in these decisions held that it had itself no power to protect marital rights against state statutes or the decisions of state courts; it may be properly deduced from this that the same principle will apply in the case of the protection of parental rights.

The counsel for The Society of the Sisters of the Holy Names of Jesus and Mary rely to a very great extent, for the support of their view as to the scope of the application of the "due process of law" clause of the Fourteenth Amendment upon the quotations which they give from two dissenting opinions of Mr. Justice Harlan.

The view of Mr. Justice Harlan is that of the dissenting justices in the *Slaughter House* cases, and represents a view as to the character of the Fourteenth Amendment which has been often presented to this Court and always repudiated by it. These dissenting opinions represent not what the law *is*, but what this Court has repeatedly decided it is *not*.

THE CRY OF BOLSHEVISM.

Both absurd and unjustifiable is the attempt in the brief last referred to, to compare the new Oregon School Law with the legislation of Soviet Russia.

If there is anything which can cause the great mass of the people of this country to lose their fear of "Bolshevism," it is the growing habit to apply this term to any law which tends to injuriously affect any powerful special interest.

This term was applied with great vigor and persistency to the recent novel economic laws adopted by the State of North Dakota, but this Court, utterly disregarding such childish argument, upheld all these laws in the case of *Green* v. *Frazier*, 253 U. S. 233, 64 L. ed. 878. In the course of its decision in this case the Court said: "Questions of policy are not submitted to judicial determination, and the courts have no general authority of supervision over the exercise of discretion which, under our system, is reposed in the people or other departments of government. . . . With the wisdom of such legislation, and the soundness of the economic policy involved, we are not concerned. Whether it will result in ultimate good or harm it is not within our province to inquire."

THE CHARGE OF LIBEL AGAINST THE ROMAN CATHOLICS.

Without any basis in fact is the charge (contained on p. 22 of the brief of counsel for The Society of the Sisters of the Holy Names of Jesus and Mary) that the brief of the appellant contained an "inexcusable and cruel . . . libel" against the Roman Catholics.

No charge against any religion is contained in that brief, and no religion is specially referred to. The attorneys for the Governor of Oregon have attempted to argue this question strictly as a question of constitutional law, and contend that it should be argued on this basis by the attorneys for the appellees, and that it should and will be decided solely on this basis by this Court.

It is a contention of the appellants, however, that the Supreme Court, according to its previous decisions, must uphold a state statute if there are any possible conditions under which it might be necessary and proper. In connection with this contention certain hypothetical conditions were set out which would clearly render a law of the character of the Oregon School Law necessary and proper.

After reading the official arguments in support of this law (which the appellee furnishes on pp. 24, 25 of Appendix 1 of his brief) and the figures of the vote on its adoption, it is evident that a majority of the voters of Oregon believed that the general welfare of the State would be promoted by compelling all children (with some slight exceptions) to receive a certain amount of education in the public schools of the State. We believe that the opinion of these voters as to the propriety of such a law is binding upon the courts regardless of the personal opinions of the individual judges or justices thereof as to the wisdom of such a law.

GENERAL SCOPE OF ARGUMENTS IN BRIEFS OF APPELLEES.

While the question of the wisdom of the Oregon School Law is manifestly not before this Court, the greater part of the brief for The Society of the Sisters of the Holy Names of Jesus and Mary, and the whole of the "Brief Amici Curiae on Behalf of the Domestic and Foreign Missionary Society of the Protestant Espicopal Church," are devoted to arguments which relate to the wisdom and not to the constitutionality of the law.

It is contended by the appellants that all arguments of this character should be entirely disregarded by the Court.

When the attorneys for any of the appellees argue their case from a strictly legal standpoint, it is to be noted that the authorities upon which they principally rely are dissenting opinions, or detached sentences of dicta. No single final decision of this Court has been cited in any of their briefs which can be legitimately construed as supporting any of the grounds upon which the Oregon School Law is alleged to be unconstitutional.

In particular no decision has been cited which holds that the "due process of law" clause in the Fourteenth

Amendment protects rights arising out of family relations, or that the obligation of a contract is impaired or property taken without due process of law through the indirect loss to a private corporation as the result of the exercise of a proper governmental function.

In closing reference is made to the following statement found on pp. 68-9 of the brief of counsel for The Society of the Sisters of the Holy Names of Jesus and Mary:

> "Only recently a revolting murder was perpetrated for sport and in cynical disregard of all that was right by two educated young sons belonging to respectable families, and the public prints throughout the land proclaimed the fact that these young assassins, although amply educated otherwise by parents of large means, had had no religious or moral training worthy of the name."

The fact was that these young men had been educated in private schools.

Respectfully submitted,

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